2013 IL App (2d) 130076-U
No. 2-13-0076
Order filed November 20, 2013

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

INDIANA INSURANCE COMPANY, Plaintiff and Third-Party Plaintiff-Appellant, v. CATHY STACKHOUSE, et al., Defendant, (Amco Insurance Company, Third-Party Defendant-Appellee).	)	Appeal from the Circuit Court of Lake County. No. 10-MR-783 Honorable Christopher C. Starck, Judge, Presiding.

JUSTICE SCHOSTOK delivered the judgment of the court.
Presiding Justice Burke and Justice McLaren concurred in the judgment.

ORDER

¶ 1 *Held:* Based upon the law of the case, this court affirms the trial court's decision to dismiss the third-party plaintiff's complaint and deny it leave to file an amended complaint where third-party plaintiff's allegations were based on claim that was previously rejected by this court.

¶ 2 This is the third time that this case is before this court. The case began on April 26, 2008, when Cathy Stackhouse was injured when she was walking on the Lakemoor Country Club golf

course (Lakemoor) and was struck by a falling tree. Stackhouse filed a complaint against Lakemoor and its manager, Royce Realty and Management Corporation (Royce), sounding in negligence. Indiana Insurance Company (Indiana) had issued a commercial general liability (CGL) policy to Royce. Amco Insurance Company (Amco) had issued a CGL policy and an umbrella policy to Lakemoor. Amco defended Lakemoor and Indiana initially defended Royce. After defending Royce for almost two years without a reservation of rights, however, on May 4, 2010, Indiana tendered Royce's defense to Amco and filed a declaratory judgment action asserting that it owed no coverage to Royce. Amco refused to accept Indiana's tender of Royce's defense. On June 17, 2010, Amco filed a declaratory judgment action, seeking a determination that it did not owe Royce a duty to defend.

¶ 3 On October 8, 2010, following a trial, the jury returned a verdict in the plaintiff's favor for $4,529,322.24. The jury found Lakemoor and Royce equally responsible. After the trial court denied Royce's motion for judgment notwithstanding the verdict (NOV), Royce filed a timely notice of appeal. Thereafter, Stackhouse and Amco entered into a settlement agreement pursuant to which Amco paid Stackhouse $3,629,322.24.

¶ 4 On November 30, 2010, Royce assigned to Stackhouse all claims Royce had against Indiana. On December 20, 2010, pursuant to a release and confidential settlement agreement, Amco dismissed its declaratory judgment action against Royce. In exchange, Royce released all claims it might have against Amco arising out of the Stackhouse lawsuit.

¶ 5 On January 25, 2012, Royce and Stackhouse filed a motion for summary judgment in response to Indiana's declaratory judgment action as to the issue of coverage.

¶ 6 On June 4, 2012, this court affirmed the trial court's decision denying Royce's motion for a judgment NOV. *Stackhouse v. Royce Realty & Management Co.*, 2012 IL App (2d) 110602 (*Stackhouse I*).

¶ 7 On June 19, 2012, Indiana filed a two-count complaint against Amco. Both counts alleged that Amco had wrongfully refused to defend Royce and that Indiana had incurred over $100,000 in defense fees and costs due to Amco's wrongful refusal. Indiana pled that it owed no coverage to Royce for the Stackhouse incident. Indiana further pled that Royce was an insured under the Amco policies. Indiana asserted that because Amco refused to defend Royce, it breached its duty to defend, which estopped it from asserting any coverage defenses.

¶ 8 On August 22, 2012, Amco filed a motion to dismiss the third-party complaint pursuant to sections 2-615, 2-619, and 2-619.1 of the Code of Civil Procedure (the Code) (735 ILCS 5/2-615, 2-619, 2-619.1 (West 2012)). Amco alleged that (1) Indiana had no standing; (2) the release between Royce and Amco extinguished any of Indiana's claims against Royce; (3) Indiana has not pled a claim for equitable contribution or subrogation; (4) Indiana had not pled a claim for bad faith.

¶ 9 On October 2, 2012, the trial court granted summary judgment to Royce and Stackhouse on their motion for summary judgment, finding that Indiana was obligated to provide insurance coverage to Royce based on the CGL policy that it had sold to Royce. Indiana appealed from that order.

¶ 10 On October 24, 2012, the trial court granted Amco's motion to dismiss Indiana's complaint pursuant to section 2-619 of the Code. On November 21, 2012, Indiana filed a motion to reconsider and leave to file an amended third-party complaint. Indiana attached to its motion its proposed amended third-party complaint. In the proposed amended third-party complaint, Indiana again

asserted that it owed no insurance coverage to Royce. On December 19, 2012, the trial court denied Indiana's motion to reconsider and denied Indiana leave to file an amended third-party complaint. Indiana thereafter filed a timely notice of appeal. That appeal is now before us.

¶ 11 On May 30, 2013, after the present appeal was filed, this court affirmed the trial court's judgment of October 2, 2012, which determined that Indiana did owe Royce coverage as to the Stackhouse incident. *Indiana Insurance Co. v. Royce Realty and Management, Inc.*, 2013 IL App (2d) 121184 (*Stackhouse II*). On September 25, 2013, the Illinois Supreme Court denied Indiana's petition for leave to appeal.

¶ 12 ANALYSIS

¶ 13 In this appeal, Indiana argues that the trial court erred in dismissing its complaint pursuant to section 2–619 of the Code and denying it leave to file an amended complaint. Indiana's arguments are based on the premise that *Stackhouse II*, in which this court held that Indiana owed Royce insurance coverage for the Stackhouse incident under the CGL policy it issued, was wrongly decided. In its appellate brief, Indiana insists that the policy it issued Royce "clearly, provides no coverage for the Stackhouse accident." In its appellate reply brief, Indiana asserts that Amco's arguments that Indiana did owe Royce insurance coverage are premature because its leave to appeal in *Stackhouse II* was still pending before the supreme court. In the conclusion of it reply brief, Indiana summarized its argument as being:

> "Indiana effectively pled that its policy does not provide coverage (an issue still on appeal) and that Amco's policy did provide coverage. Indiana therefore could plead and prove that it is entitled to subrogation against Amco to recover defense costs paid."

¶ 14 Section 2-619(a)(4) of the Code provides that a defendant may file a motion for dismissal of the action on the grounds "that the cause of action is barred by a prior judgment." 735 ILCS 5/2-619 (a)(4) (West 2012). Section 2-619's purpose is to provide litigants with a method of disposing of issues of law and easily proved issues of fact—relating to the affirmative matter—early in the litigation. *Van Meter v. Darien Park District*, 207 Ill. 2d 359, 367 (2003).

¶ 15 A motion for involuntary dismissal under section 2-619 of the Code admits the legal sufficiency of the complaint, admits all well-pleaded facts and all reasonable inferences therefrom, and asserts an affirmative matter outside the complaint that bars or defeats the cause of action. *Kean v. Wal-Mart Stores, Inc.*, 235 Ill. 2d 351, 361 (2009). In a section 2-619 motion, the movant is essentially saying, "Yes, the complaint was legally sufficient, but an affirmative matter exists that defeats the claim." *Reynolds v. Jimmy John's Enterprises, LLC*, 2013 IL App (4th) 120139, ¶ 31. When ruling on the section 2-619 motion, the court construes the pleadings in the light most favorable to the nonmoving party, and should only grant the motion if the plaintiff can prove no set of facts that would support a cause of action. *Id.* A section 2-619 motion is reviewed *de novo*. *Kean*, 235 Ill. 2d at 361.

¶ 16 Here, the trial court did not specify its basis for dismissing Indiana's complaint. Nonetheless, it is readily apparent that this court's decision in *Stackhouse II* barred Indiana's cause of action once it became final as law of the case. The law-of-the case doctrine protects the parties' settled expectations, ensures uniformity of decisions, maintains consistency during the course of a single case, effectuates proper administration of justice, and brings litigation to an end. *Petre v. Kucich*, 356 Ill. App. 3d 57, 63 (2005). Thus, the doctrine bars relitigation of an issue previously decided in the same case. *Long v. Elborno*, 397 Ill. App. 3d 982, 989 (2010). Issues previously decided

include issues of both law and fact. *Alwin v. Village of Wheeling*, 371 Ill. App. 3d 898, 910 (2007). "Questions of law that are decided [in] a previous appeal are binding on the trial court on remand as well as on the appellate court in subsequent appeals." *Long*, 397 Ill. App. 3d at 989. Based on this court's holding in *Stackhouse II* that Indiana owed Royce insurance coverage as to the Stackhouse incident, Indiana could not maintain an action based on the premise that it owed Royce no such coverage. *Id.*

¶ 17 We note that there are two recognized exceptions to the law-of-the-case doctrine. Those exceptions apply if: (1) a higher reviewing court makes a contrary ruling on the same issue subsequent to the lower court's decision; or (2) a reviewing court finds that its prior decision was palpably erroneous. *Bjork v. Draper*, 404 Ill. App. 3d 493, 501 (2010). Here, neither of those exceptions apply. *Stackhouse II* was just recently decided, and the Illinois Supreme Court denied Indiana's petition for leave to appeal. Moreover, no recent Illinois Supreme Court decision calls this court's analysis in *Stackhouse II* into question. Further, upon reviewing our decision in *Stackhouse II* again, we find that it was well-reasoned. It was not palpably erroneous. Accordingly, the trial court properly dismissed Indiana's complaint. See *Camper v. Burnside Construction Co.*, 2013 IL App (1st) 121589, ¶ 29 (a reviewing court may affirm a 2-619 dismissal on any proper ground supported by the record).

¶ 18 For this same reason, the trial court did not abuse its discretion in denying Indiana leave to file an amended complaint. In determining whether the denial of a party's motion to amend a pleading resulted in an abuse of discretion, we consider whether: (1) the proposed amendment would cure the defective pleading; (2) previous opportunities to amend the pleading could be identified; (3) other parties would sustain prejudice or surprise by virtue of the proposed amendment; and (4)

the proposed amendment was timely filed. *Miller v. Pinnacle Door Co.*, 301 Ill. App. 3d 257, 261 (1998). Here, Indiana's proposed amended complaint did not cure the defect in its original complaint because it continued to allege that it owed no insurance coverage to Royce regarding the Stackhouse incident.

¶ 19 Finally, we note that Indiana raises a new argument in its reply brief, that being that it "should be entitled to seek recovery of half the amount it paid to defend Royce, based on its demand that Amco share 50/50 in Royce's defense and Amco's subsequent agreement to do so as reflected in Amco's brief in its Motion to the trial court." Indiana's argument is forfeited because it raises it for the first time in its reply brief. *In re Marriage of Winter*, 2013 IL App (1st) 112836, ¶ 30. Moreover, even if it were not forfeited, we would find Indiana's argument to be without merit. Indiana's argument essentially requests equitable contribution from Amco for the defense costs it incurred defending Royce. Contribution applies to multiple, concurrent insurance situations and is only available where the concurrent policies insure the same entities, the same interests, and the same risks. *Home Insurance Co. v. Cincinnati Insurance Company*, 213 Ill. 2d 307, 316 (2004). As Indiana pled in both its complaint and its proposed amended complaint that its policies with Amco were not concurrent as only Amco owed Royce insurance coverage, Indiana did not plead a valid cause of action for equitable contribution. Cf. *Villa Park Plaza, LLC v. Discover Property & Casualty Insurance Co.*, 2013 IL App (2d) 120492-U, ¶ 20 (plaintiff did not assert valid cause of action for equitable contribution where it asserted that its insurance policy did not cover the damage at issue and that other insurer should be solely responsible).

¶ 20 CONCLUSION

¶ 21 For the foregoing reasons, the judgment of the circuit court of Lake County is affirmed.

¶ 22 Affirmed.